Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Rules Governing	)	CC Docket No. 92-26
Procedures to Be Followed When	)	
Formal Complaints Are Filed Against	)	
Common Carriers.	)	

COMMENTS OF U S WEST COMMUNICATIONS, INC.

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SUMMARY

The Commission's Notice of Proposed Rulemaking in this proceeding stated that certain modifications are needed to facilitate timely resolution of the Section 208 complaint process.[1] The Commission observed that the current complaint rules permit parties to file unnecessary pleadings and needlessly prolong the discovery process, thereby frustrating prompt resolution of formal complaints.

USWC takes the position that, while reforming the complaint rules is, generally speaking, a step in the right direction, certain rule changes, such as those purporting to shorten filing deadlines, are not necessarily helpful. USWC supports the Commission's proposed bifurcation approach -- for Section 208 complaints that allege a violation of the Communications Act, the Commission's rules or orders, the Commission will first render a finding of liability based on facts and law before any damage claims would be considered. This proposal has the greatest potential to reduce unnecessary pleadings.

USWC objects to the elimination of relevance as a standard in the discovery process. If the Commission wishes to maintain any semblance of control over the process, it must articulate a standard against which the reasonableness of a discovery request could be measured; and relevance is that

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[1]All acronyms and quotations used in this Summary are fully identified in the text.

standard. Moreover, the proposal that would make a defendant's refusal to answer an interrogatory to be deemed an admission of the "allegations" contained in the interrogatory is equally unavailing. It flies in the face of well-established discovery principles.

Meanwhile, USWC offers some proposals for the Commission's consideration but cautions that the Commission must also examine its own ability promptly to resolve disputes which have been fully briefed and presented to it. Be it a ruling on an interlocutory matter or a final resolution of a complaint, parties should not have to wait for years for a ruling, which is unfortunately the case now. The Commission's current proposal does not address this internal problem. These are issues that are beyond the reach of the parties, and that the Commission alone can address.

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Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers.	)	CC Docket No. 92-26

COMMENTS OF U S WEST COMMUNICATIONS, INC.

U S WEST Communications, Inc. ("USWC"), through counsel, hereby submits its comments in response to the Notice of Proposed Rulemaking released in the above-captioned proceeding.[1]

I. INTRODUCTION

In the NPRM, the Federal Communications Commission ("Commission") stated that certain modifications are needed to facilitate timely resolution of the formal complaints process.[2] It is the Commission's apparent view that the current complaint rules permit parties to file unnecessary pleadings and needlessly prolong the discovery process, thereby frustrating prompt disposition of complaints filed. The NPRM further states that in

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[1] Notice of Proposed Rulemaking, CC Docket No. 92-26, FCC 92-59, rel. Mar. 12, 1992 ("NPRM").

[2] Id. at ¶ 1.

light of time constraints imposed by the Federal Communications Commission Authorization Act of 1988,[3] the Commission is anxious to eliminate some of the delays which frequently occur under present rules.[4] In an effort to achieve these goals, the Commission proposes, among other things, to modify filing deadlines, eliminate certain pleading opportunities and abbreviate or consolidate the discovery process.[5]

USWC is of the view that while reforming the complaint rules may, generally speaking, be a step in the right direction, certain rule changes proposed by the Commission in this NPRM are not necessarily helpful in achieving the stated goals and objectives of the NPRM. And to the extent that they might thwart the parties' rights to due process, could even be counterproductive. Further, the proposed rule changes do not address a major cause of delay in achieving final resolution of complaints -- the time it takes for the Commission to issue dispositive orders, both final and interlocutory.

Below, USWC offers its comments on the specific proposals contained in the NPRM and offers a suggestion not specifically raised by the NPRM.

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[3]Pub. L. No. 100-594, 102 Stat. 3021, 3023 (1988)(codified at 47 U.S.C. § 208(b)). Congress amended Section 208 of the Communications Act to require that those complaints challenging the lawfulness of a "charge, classification, regulation, or practice" are to be resolved within 12 months of filing, or 15 months if the case involves extraordinarily complicated facts.

[4]NPRM at ¶ 6.

[5]Id. at ¶¶ 6-7.

II. DISCUSSION

Pleadings Filed in Complaint Proceedings:

The Commission proposes to reduce the permissible time for a defendant to file an answer to a complaint from 30 to 20 days from the date of service.[6] USWC submits that the reduction of 10 days for filing an answer may significantly impact the overall length of time required to adjudicate a complaint. Because of the often complex and substantial financial consequences attached to Section 208 complaints, defendants must have a reasonable opportunity to conduct a thorough investigation of the allegations made, analyze the factual and legal issues and marshall resources to prepare answers. The proposed time reduction needlessly hampers this process, and may well lead to an increase in the number of motions for extension of time being filed, causing further delays in the complaint proceeding.

The Commission also proposes to introduce time limits for filing briefs, i.e., within 15 to 20 days, as the case may be, from the date the staff orders submission of the briefs, and that such briefs be limited to no more than 25 to 35 pages for briefs and 20 pages for reply briefs.[7] USWC understands the attraction of this proposal but cautions that there should not be a slavish adherence to predetermined page limits or time frames.

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[6] Id. at ¶ 8.

[7] Id. at ¶ 9.

The issues and complexities of different cases warrant individualized treatment. Thus far, the existing rules codify neither page nor time limits. A strong argument can be made that those matters should be left to agreements reached in status conferences, during which the staff should have the flexibility to set page and time limits, depending on the complexity of the individual case involved. Nonetheless, USWC has no strong objection to page limits, so long as waivers are freely given for good cause shown.

On the matter of oral orders,[8] USWC has a strong bias against oral orders. Oral orders do not provide a proper record and invariably lead to disputes as to what was actually ordered if not promptly memorialized. If a ruling is made during a status conference or other meetings and no proposed order is presented for adoption and release, then no "order" should be deemed issued until a written order from the Commission is in fact released. Parties should be required to have a proposed order at any status conference or meeting at which it intends to request relief from the staff that is not the subject of a previously filed written motion. If the staff issues an "order" during a status conference or meeting, the "order" should be memorialized in writing and served upon the parties within three working days.

Section 1.726 now permits a complainant to reply to a

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[8] See NPRM at n.4.

defendant's answer to a complaint.[9] The Commission proposes to eliminate replies except in those cases where an answer to a complaint presents affirmative defenses that are factually different from any denials also contained in the answer.[10] USWC supports this proposal, which would serve to eliminate unnecessary pleadings.

Additionally, USWC suggests that the Commission should duly exercise its authority to dismiss those complaints that are outright frivolous. Under Section 1.728(a) of the Commission's rules, the Commission has the authority to dismiss any document purporting to be a formal complaint which fails to state a cause of action under the Communications Act.[11] To wit: frivolous claims, or claims that contain wholly unsupported factual and legal allegations, should be summarily dismissed. Allowing this kind of complaint to languish not only wastes valuable Commission time and resources, it also has the unwanted effect of encouraging more frivolous or ill-conceived complaints to be filed.

The Commission proposes to amend Rule 1.727 to afford defendants the right to seek a motion for dismissal or summary judgment to be filed contemporaneously with the answer.[12] The Commission also proposes that oppositions to motions address only

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[9] 47 C.F.R. § 1.726.

[10] NPRM at ¶ 10.

[11] 47 C.F.R. § 1.728(a).

[12] NPRM at ¶ 11 and Appendix, § 1.727(d).

those issues raised by the motion and replies to oppositions to motions be disallowed due to their redundancy.[13] USWC does not object to the Commission providing for summary judgment motions. However, since the existing rules do not provide for motions for summary judgment, USWC asks the Commission to clarify whether it intends to permit summary judgment motions and whether such motions, if permitted, will be presented, reviewed and decided on the basis of accepted judicial standards for summary judgments.

Finally, USWC agrees that the Commission's rule on fees payable by the party who files a complaint should be set forth in its complaint rules and clearly state that when a complaint is against multiple defendants, separate fees will be assessed against the complainant for each named defendant.[14] Moreover, failure to submit the fees as required should result in the complaint being returned to the complaining party, but without further processing or service upon the defendant. The Commission should consider requiring complainants to verify or affirmatively allege that they have paid all required filing fees.[15]

Discovery Issues:

Bifurcation

The Commission proposes to change the discovery

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[13] Id.

[14] Id. at ¶ 12.

[15] Complainants currently state affirmatively that they have not filed a claim with a court raising the same issues in the complaint. It would not be an onerous task to add an affirmation that all filing fees have also been paid.

mechanisms in several significant ways. First, unless otherwise directed by the staff, no discovery regarding alleged damages will be permitted until after an initial finding of liability by the Commission, thus essentially bifurcating the complaint proceeding.[16] USWC supports this bifurcation approach. The relevant complaint rule, as it now stands, is discretionary on bifurcation of liability and damages.[17] Complainants are currently free to seek discovery on the issues of damages and liability at the same time and receive a ruling that addresses both issues. Bifurcating the proceeding will eliminate needless damage discovery in those cases where no liability is found to exist. This proposed change has the greatest potential among those proposed in the NPRM to reduce significantly unnecessary controversy and pleadings.[18]

Accordingly, the proposed rules should clearly state that for Section 208 complaints alleging a violation of the Communications Act, a Commission rule or Commission order, the Commission will first render a finding of liability based on facts and law before any damage claims would be considered. And since the issue of damages is predominantly factual in nature, the Commission could designate particularly complex damage claims for evidentiary hearing before a Commission Administrative Law

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[16]NPRM at ¶ 13.

[17]47 C.F.R. § 1.722(b)(2)(i).

[18]USWC assumes that discovery intended to elicit facts relevant to the issue of liability will be permitted during the liability phase.

Judge or, alternatively, if the parties so choose, resolve the damage claims through the available alternative dispute resolution ("ADR") process.[19]

Relevance

The Commission seeks comments on whether issues regarding relevance should continue to be grounds for opposing an interrogatory.[20] USWC submits that if the Commission wishes to maintain any semblance of control over the discovery process, it must articulate a standard against which the reasonableness of a discovery request could be measured. Relevance should be maintained as that standard. Aside from the fact that the federal court rules and virtually all state court rules accept relevance as the appropriate standard, there is no justifiable reason why a party should have the right to pursue information that is not relevant to the issues in the complaint. The proposal to eliminate relevance as a standard for determining the reasonableness of discovery is ill conceived and will result in more, rather than fewer, disputes stemming from discovery. Moreover, such an approach will turn the complaint proceeding into an unmanageable free-for-all.

Under federal rules, a complainant's right to obtain

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[19]The Commission has decided to develop a pilot project to explore the use of ADR for Section 208 complaints. See Use of Alternative Dispute Resolution Procedures in Commission Proceedings and Proceedings in which the Commission is a Party, GC Docket No. 91-119, 6 FCC Rcd. 5669, 5670 ¶ 11 (1991). See also generally Comments of USWC, filed June 17, 1991 in GC 91-119.

[20]NPRM at ¶ 15.

facts through discovery certainly has its limits. The Federal Rules of Civil Procedure set forth the general guideline that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action[.]"[21] Clearly, fairness dictates that where a discovery request touches upon irrelevancy or encroaches upon recognized privileges, it should not be permitted.[22] Courts have repeatedly ruled that while the requirement that discovery be relevant to the subject matter involved is to be broadly construed to encompass any matter that bears on, or could reasonably lead to matters that bear on the issues in the case, discovery would not be allowed based on a mere allegation or if the inquiry lies in a speculative area.[23] A party should not be permitted to roam outside of the zone of relevancy and explore matters which are not directly connected to the allegations set forth in the complaint. Furthermore, when discovery requests

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[21]Fed. R. Civ. P. 26(b)(1)(emphasis added). The Commission has stated that it will use the federal rules as guidance to formulate its own complaint rules. See NPRM at n.3.

[22]See Hickman v. Taylor, 329 U.S. 495, 511-14 (1947).

[23]See Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 363, 98 S.Ct. 2380, 2395 (1978) ("A bare allegation of wrongdoing . . . is not a fair reason for requiring a defendant to undertake financial burdens and risks to further a plaintiff's case."; see, e.g., Netto v. Amtrak, 863 F.2d 1210, 1216 (5th Cir. 1989); MacKnight v. Leonard Morse Hosp., 828 F.2d 48, 52 (1st Cir. 1987); Marshall v. Westinghouse Elec. Corp., 576 F.2d 588, 592 (5th Cir. 1978) (That discovery rules are designed to assist a party to prove a claim it reasonably believes to be viable without discovery, not to find out if it has any basis for a claim. That the discovery might uncover evidence showing that the plaintiff has a legitimate claim does not justify the discovery request.).

approach the outer bounds of relevance, the request must be weighed against the hardship to the party from whom discovery is sought.[24] This is a particular concern when the opposing parties are competitors and the information sought goes to a party's marketing or competitive strategies.

USWC finds equally unacceptable the proposal that would make a refusal to answer an interrogatory to be deemed an admission of the "allegations" contained in the interrogatory.[25] With all due respect to the Commission, this proposal shows a basic lack of understanding of the purpose and use of interrogatories: interrogatories should not contain allegations but should be designed solely to ascertain facts. If admissions are being sought, a "Request for Admission" should be the proper vehicle, and then the failure to deny constitutes an admission of the fact(s) alleged. For the Commission to attempt to convert interrogatories into a request for admissions is ill conceived and flies in the face of well-established discovery principles designed to balance the discovering party's need to obtain information with the defending party's right to resist any broader discovery demands than are necessary to properly and fairly adjudicate the claims in the complaint. Furthermore, the proposal will not result in a discovering party getting what it wants -- information not in its possession. If the requesting

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[24]See Carlson Companies, Inc. v. Sperry & Hutchinson Co., 374 F. Supp. 1080 (D. Minn. 1973); In Re Surety Association of America, 388 F.2d 412 (2d Cir. 1967).

[25]NPRM at ¶ 15.

party does not have the facts, it cannot present those facts to the responding party to admit.

It is unrealistic for the Commission to think that a party upon whom an interrogatory is being served would not answer it knowing that some facts related thereto would be deemed admitted and then accept the burden (and risk) of proving at a later time that the admitted fact is not relevant to the issues presented in the complaint. No prudent litigator would take such an unreasonable risk. In sum, the Commission's proposal that a responding party answer an interrogatory or accept related facts as admitted forces the party being discovered to present a response, no matter how unrelated it is to the underlying controversy, without a meaningful opportunity to object. It strays far from long-established and accepted principles of discovery and totally undermines the party's fundamental due process rights. The Commission should strike this proposal and retain the current relevancy requirements in the discovery process.

Confidentiality Protection

Finally, the Commission proposes new rules to protect the confidentiality of information produced through discovery.[26] USWC agrees that the rules governing such protections should be fleshed out, codified and applied to all materials that a party believes in good faith fall within an exemption of the Freedom of

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[26]NPRM at ¶ 16 and Appendix, § 1.730.

Information Act.[27] This protection proposal should help reduce discovery delays since the parties can now rely on a set of rules as guidance to formulate their protective measures to safeguard against disclosure of proprietary information.

III. USWC's Proposal for the Commission's Consideration

USWC assumes that all parties would agree that while a speedy resolution to disputes is in the best interest of the parties as well as the Commission, a fair resolution based on a complete record, developed in accordance with accepted due process principles, is the ultimate objective that must be achieved. All complaints do not present the same procedural challenges or requirements. Some raise issues of law or policy which require little, if any, discovery of facts whereas others require the development of a complex factual record and raise few questions concerning the law or policy to be applied. Consequently, the Commission's complaint rules must be sufficiently flexible to accommodate the varied nature of the complaints that come before it. USWC believes that the complaint rules can provide flexibility while at the same time give the Commission the necessary control over the complaint process and the parties that are required to maintain order and efficiency.

USWC urges the Commission to consider adopting a rule which would in large part parallel the provisions contained in

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[27] 5 U.S.C. § 552.

Rule 16 of the Federal Rules of Civil Procedure.[28] The provisions contained in FRCP 16 would give the Commission the ability to set a reasonable schedule for procedural actions to be taken by the parties to a complaint proceeding. Time frames for certain actions (discovery, briefing and motions) would be determined based on the particular issues presented by the complaint, answer, affirmative defenses, response to affirmative defenses, cross complaint and answer to cross complaint. Once a reasonable schedule is agreed to, the Commission staff could aggressively monitor compliance with the agreed upon schedule under threat of sanction.

A conference would be conducted right after the complaint has been served and all responsive pleadings (answer, affirmative defenses, cross complaint, response to affirmative defenses and answer to cross complaint) have been filed. Parties would be expected to come to the conference prepared to discuss the issues in need of resolution, necessary discovery,[29] necessary briefing and any then anticipated motions. With guidance from the Commission staff conducting the conference, a schedule would be agreed upon and the parties would, within a set time frame, prepare and present a proposed joint scheduling order

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[28]Fed. R. Civ. P. 16 (Pretrial Conferences; Scheduling; Management) ("FRCP 16").

[29]A further modification to the Commission's proposed rules (proposed rules 1.729 and 1.730) concerning the time period in which discovery has to be served or discovery motions have to be made would be necessary to allow time to conduct the pretrial conference and arrive at a schedule.

to be adopted and released by the Commission. The issuance of a pretrial order would be the first order of business after the complaint and all responsive filings thereto have been filed. FRCP 16(b) provides that a scheduling order "shall issue as soon as practicable but in no event more than 120 days after filing of the complaint."[30] Modifications to the schedule would only be made pursuant to a further order of the Commission upon a showing of good cause.

The Commission's objective of achieving a timely resolution to complaints would be greatly aided by adoption of a rule to provide for pretrial conferences and pretrial orders that is patterned after FRCP 16. At the same time, the parties would be assured of having time frames for procedural actions that reasonably allow for the development of a complete record. USWC requests that the Commission give this recommendation serious consideration.

IV. CONCLUSION

USWC is encouraged that the Commission is willing to reform the complaint rules[31] in order to expedite resolution of complaints. USWC believes, though, that the heart of the frustrations caused by prolonged delays cannot solely be attributable to existing filing deadlines and unnecessary pleadings. Shortening the filing period and eliminating certain

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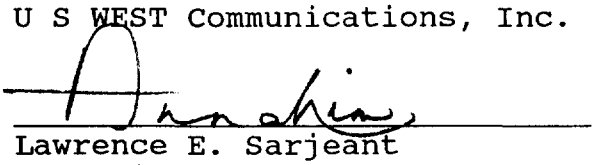
[30]Fed. R. Civ. P. 16(b).

[31]47 C.F.R. § 1.720 et seq.

pleadings are only partial remedies, if remedies at all. Thus, reforming the rules alone will not solve the problem. The Commission must also examine its own ability to resolve promptly disputes which have been fully briefed and finally presented to it. Be it a ruling on an interlocutory matter or a final resolution of a complaint, parties should not have to wait for years for a ruling, which is unfortunately the case currently. The Commission's proposed rule changes do not address this problem. This proceeding is only an incremental step in making the complaint process more expeditious. There are issues, though, which are beyond the reach of the parties that only the Commission can address.

Respectfully submitted,

U S WEST Communications, Inc.

By: 

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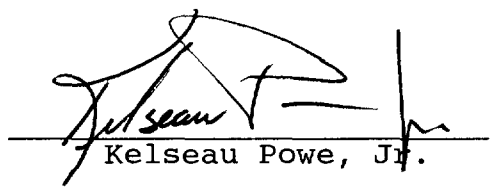
CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify on this 21st day of April, 1992, that I have caused a copy of the foregoing **COMMENTS OF U S WEST COMMUNICATIONS, INC.** to be hand delivered to the persons named on the attached service list.



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